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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 2425 of 1999

Division Bench : **Hon'ble Shri L.C. Bhadoo &**
Hon'ble Shri Dhirendra Mishra, JJ

APPELLANTS : Dhaniram and others.

Versus

RESPONDENT : The State of Madhya Pradesh

JUDGMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE SHRI L.C.BHADOO, J

I agree

Sd/-
L.C. BHADOO
Judge

POST FOR JUDGMENT ON 03 APRIL 2007

Sd/-
DHIRENDRA MISHRA
Judge

(63)

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Criminal Appeal No. 2425 of 1999

Division Bench : **Hon'ble Shri L.C. Bhadoo &**
Hon'ble Shri Dhirendra Mishra, JJ

APPELLANTS :

1. Dhaniram, aged 45 years;
Son of Panchram Patel,

2. Anandram, aged 25 years;

3. Ramdulare, aged 23 years;

Nos. 2 & 3 both sons of Dhaniram Patel

4. Ramgilas alias Ramvilas, aged 21 years, son of Dhaniram Patel;

All residents of village Tunda, P.S. Bilaigarh, District Raipur. M.P.

Versus

RESPONDENT : The State of Madhya Pradesh

Present:
Smt. Renu Kochar, learned counsel for the appellants.
Shri Akhil Mishra, learned P.L. for the State/respondent.

JUDGMENT
(Delivered on 3rd/04/2007)

Per Dhirendra Mishra, J

Appellants Dhaniram, Anandram, Ramdulari and Ramgilas have preferred this criminal appeal under Section 374(2) of the Cr.P.C. against the impugned judgment dated 12th August 1999 passed in S.T.No. 134/90 by learned 1st Additional Sessions Judge, Baloda Bazar, District Raipur whereby they have been convicted under Section 302/149, 307/149 of the Indian Penal Code and sentenced them to undergo imprisonment for life and pay a fine of Rs. 5,000/- each and to undergo R.I. for 10 years and pay a fine of Rs. 1,000/-each, in default of payment of fine to further undergo R.I. for five months and one month respectively.

2. Case of the prosecution in brief is that Anjorwa Prasad gave first information (Ex.P/16-A) in police station Bilaigarh on 13.7.1989 at about 23.30 hours, on the basis of which crime No. 112/89 was

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registered for the offence punishable u/s 302, 307, 147, 148/149 of the IPC against the accused Dhaniram and his sons Anandram, Ramdulari, Ramgilas and Ramkumar. As per First Information Report, thrashing field of Anjorwadas is adjacent to the field of accused Dhaniram. Today i.e. 13.7.1989, Dukhiram, father of complainant, erected boundary of his field just in front of the house of the complainant. His father Dukhiram (since deceased) asked Dhaniram to straighten his boundary, however, Dhaniram denied and challenged the father of the complainant to come near the boundary and when he said, if he goes, what he will do, on which he (Dhaniram) replied that he shall beat him. However, father of the complainant went on the boundary, whereupon Dhaniram with axe and his sons Ramdulari, Ramgilas, Ramkumar alias Chhutti and Anandram with lathi came there and assaulted his father with axe and lathi. He became unconscious and fell on the ground, even then they continued assaulting. His brother Manharan went there to intervene, however, Dhaniram Patel with axe and Anandram, Ramdulari and Ramgilas @ Chhutti with lathis assaulted him saying that he has come here to save him (Dukhiram) and killed him. When his mother Bodhin Bai went to save them, the accused persons also assaulted her with axe and lathis shouting "kill her" and all the five killed her. When the complainant went to intervene, Dhaniram shouted "kill him also" and assaulted him on his head with axe and his sons Anandram, Ramdulari, Ramgilas and Ramkumar assaulted on both arms, right ribs and buttocks with axe and lathi, as a result of which blood started oozing and he fell on the field. The accused persons thinking that all the four are dead, fled from there. After their departure, he saw that his mother Bodhin Bai and brother Manharan were dead and there was a cut injury on the head of his father and there were other injuries caused by lathis on his body. Sonu and Dilharan lifted and brought him.

3. During investigation merg intimation of Ex.P/17, P/18 & P/36 with reference to unnatural death of Bodhin Bai, Manharan and Dukhiram was registered. Spot map (Ex.P/1) was prepared. Inquest over the body of deceased Manharan, Bodhin Bai and Dukhiram was prepared vide Ex.P/13, P/14 and P/16 in the presence of the witnesses. All the three dead bodies were sent for autopsy and

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postmortem examination reports are Ex.P/5, P/6 & P/7. On the memorandums of the accused persons (Ex.P/19 to P/23 dated 14.7.1989) weapons of offence i.e. axe from Dhaniram and lathi from rest of the accused persons, were taken into possession vide Ex.P/24 to P/28. Wearing apparels worn by the accused at the time of incident were seized vide Ex.P/29 to P/34.

4. Seized weapons of offence were sent to the doctor for examination and his opinion vide Ex.P/36B, P/37, P/38, P/39 and P/40, whether the injuries present on the body of the deceased persons and injured, could be caused by the above weapons. Investigating Officer also sent a query to the B.M.O., PHC, Bilaigarh seeking his opinion whether the injuries sustained by injured Anjorwa were caused on the vital parts and whether the injuries were sufficient to cause death in the absence of treatment. In reply to the above query, the doctor opined (Ex.P/41) that the injuries were grievous in nature and on the vital parts of the body and death could occur from the above injury in the absence of treatment. All the seized articles were sent for chemical examination and as per opinion of the Forensic Science Laboratory the axe and lathis, clothing of Dhaniram i.e. Lungi and underwear, Baniyan, Shirt and Lungi of Anandram, Shirt and Lungi of Ramkumar contained blood.

5. After completing investigation charge sheet was filed against Dhaniram, Anandram, Ramdulari and Ramgilas in the Court of Judicial Magistrate First Class, Baloda Bazar who in turn committed the case to the Court of Sessions Judge, Raipur from where learned trial Court received the same on transfer for trial. However, charge sheet against the juvenile delinquent Ramkumar was filed before the Juvenile Court. Learned Additional Sessions Judge framed charges against all the accused persons under Sections 148, 302 in the alternative 302/149 of the IPC, separately for causing death of Dukhiram, Bodhin Bai and Manharan and charge under Section 307 or in the alternative 307/149 of the IPC for attempting to cause death of Anjorwadas. The accused persons abjured their guilt. Prosecution in order to establish the charge against the accused persons examined 18 witnesses in all. Thereafter, statements of the accused were recorded under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them in the

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prosecution evidence and pleaded innocence and false implication in the offence. They further submitted that Anjorwadas wanted to keep Mankibai, wife of Manharan, as his wife, his family members objected to it, however, Anjorwadas was determined irrespective of the consequences, as a result of which they quarreled with each other. Learned trial court after hearing counsel for the respective parties, convicted and sentenced the accused as mentioned above.

6. Homicidal death of Dukhiram, Bodhin Bai and Manharan is not in dispute. Similarly, injuries present over the person of Anjorwadas are also not in dispute. Even otherwise from the statements of witnesses namely PW-10 Anjorwadas, PW-13 Sahatrinbai and PW-15 Bhukhinbai who were eyewitnesses of the incident and from the statement of PW-6 Dr. Chandrashekhar Patel, who conducted postmortem on the body of deceased persons and submitted his report of Ex.P/5, P/6 and P/7 and found following injuries, the homicidal death of deceased Dukhiram, Bodhin Bai and Manharan and attempt on the life of injured Anjorwa, is established.

Manharan

1. An incised injury on the left lateral parietal head, 1" above to left ear pinna obliquely transverse and downwards direction in the size of 2.5" x 1.3" x 2.2" (deep up to brain cavity) fracture of skull. Bone seen and few discharge of barin material.
2. An lacerated injury on the left lateral posterior head 2 ½ " below the injury No. 1, transverse-downwards size 2.4" x 1" x 1".
3. An incised injury on the right upper parietal region 2.5" lateral to middle line size 2.5" x 1.2" x Bone skull cavity. Discharge of brain material seen.
4. An incised penetrated injury on the back of right chest near rib bone in the size of 1.4 x .5 x 2.3 cm.

On internal examination the head bone of injury No. 1 and 3 was found fractured. In his opinion the cause of death is shock due to excessive hemorrhage and the death was homicidal in nature.

Bodhin Bai

1. An incised injury and lacerated related to each other over right upper parietal of head 1 ½" lateral to middle line-obliquely – vertex and downwards 6.8" x 1.8" up to cavity. The nearby bone was broken and brain material had come out.
2. Bone below the above injury was also broken.

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The cause of death was shock due to excessive hemorrhage and the death was homicidal in nature.

Dukhiram

1. An incised lacerated injury on the top upper part of head 4" above to Bindi point obliquely transverse downwards size 3 ¼" x 1" x 1". The skull bone near the above injury was broken and two pieces were visible.
2. Three incised injuries on the parietal region near each other and obliquely transverse downwards of size 2.5 x .5 x .5 cm., 2 ¼ x .5 x ¼ cm., 2 ¾ x ¼ x ¼ cm. Bone near the first injury was found broken.

The cause of death was shock due to excessive hemorrhage as a result of above injuries and death was homicidal in nature.

Anjorwadas

1. Two incised injuries on the top upper parietal left head – obliquely downward of size 2.5 x ½ ¼ , 2 ¼ x ½ x ½ c.m.
2. An incised injury on the lower parietal head obliquely in the size of 2 ½ x ¼ c.m.
3. Two bruises with diffused swelling near each other on the left arm in the size of 2.5 x 1 cm., 2 x 1 cm.
4. Diffused swelling on the right middle arm of size 2 x 1.5 cm.
5. Diffused swelling on the right lower lateral chest, tenderness present, size 2 ¾ x 1 ¾ cm.
6. An lacerated incised injury above thigh in the size of 2 ¼ x ½ x ½ c.m.

The patient was advised X-ray. In his opinion, Injury No. 1 & 2 could be caused by hard and blunt object. In reply to the query of police, he opined that injuries present over the person of Anjorwa were grievous in nature and were sufficient to cause death in the absence of proper treatment.

7. Learned counsel for the accused/appellant submitted that the learned trial Court was not justified in relying upon (i) the testimony of solitary eyewitness Anjorwadas who is highly interested and partisan witness being closely related with the deceased persons, (ii) the recovery of weapons of offence from the possession of the appellants as the independent witnesses of recovery have not supported the case of the prosecution and independent witnesses who were present there, have not been examined, (iii) the F.I.R. of Ex.P/ 16-A lodged by Rajaram as the same is in complete variance with the account given by Anjorwa and the learned trial Court was

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also not justified in relying upon the statement of Sahatrin Bai (PW-13), as she is also highly interested and partisan witness being close relative of the deceased persons. She further submitted that there is no evidence of formation of unlawful assembly with the purpose of common object of murdering the deceased persons and attempting to cause death of injured Anjorwadas and lastly that, the injuries sustained by the deceased persons were incised injures which could be caused by hard and sharp object as per opinion of the doctor performing autopsy, however, except accused Dhaniram from all other accused persons only lathi has been seized. Moreover, in his Court statement PW-10 Anjorwa has stated that Dhaniram was carrying lathi whereas Anandram, Ramdulari and Rambilas were holding axe, thus the account given by injured eyewitness is in complete variance with the case of the prosecution and in the aforesaid circumstances, the Court below ought to have extended benefit of doubt to the accused persons.

8.. Learned counsel for the accused/appellant placed reliance on the judgment delivered in the matter of **Bhola Singh Vs. State of Punjab**, reported in **1999 Cri.L.J. 1132**, in the matter of **State of Rajasthan Vs. Bhanwar Singh**, reported in **IV (2004) CCR 8 (SC)**, in the matter of **Suresh Choudhary Vs. State of Bihar** reported in **2003 SCC (Cri.) 801**, in the matter of **Vijay Kumar Vs. State of Bihar** reported in **2005(2) AC 40 (Pat)** and the judgment in the matter of **Patel Chela Viram Vs. State of Gujarat** reported in **AIR 1994 SC 1250.**

9. On the other hand, learned counsel for the State/respondent supported the impugned judgment of the trial Court.

10. We have heard learned counsel for the respective parties and perused the impugned judgment of the trial Court as also the material available on record.

11. Conviction of the accused/appellants is based on the evidence of eyewitnesses PW-10 Anjorwa, PW-13 Sahatrinbai, PW-15 Bhukhin Bai. Reliance has also been placed on the recovery of weapons of offence on the memorandums of the appellants as also the recovery of bloodstained clothes worn by the appellants at the time of incident.

It has been held that the eyewitnesses account is duly corroborated by the postmortem & injury report of Dr. C.S. Patel (PW-6) and accordingly, the appellants have been convicted under Section 302, 307 with the aid of Section 149 of the I.P.C.

12. PW-1 Soncharan Sahu has prepared the site plan of Ex.P/1. PW-2 Haricharan, PW-4 Dhananjay, PW-5 Firat, PW-11 Baijnath and PW-12 Nonibai, have turned hostile whereas PW-7 Vishram Prasad and PW-8 Kholbahara are the witnesses of inquest. PW-14 Chelaram and PW-17 Shivshankar are the witnesses of memorandums of recovery. PW-14 Chelaram has stated, "he does not know the deceased persons, though he recognizes Shivshankar of village Gidhouri. Accused persons were not interrogated before him by the police. Dhaniram was also not interrogated. On being asked by the police, he signed the papers. He was declared hostile and cross-examined by the prosecution. In the cross-examination also except the fact that he had gone to village Tundra with police, he has denied all the suggestion put to him by the prosecution such as, the police interrogated Dhaniram in his presence, at the instance of accused Dhaniram the axe was discovered etc. PW-17 Shivshankar has admitted his signature in the memorandums of Ex.P/19 to P/23, however, he has stated, "he does not recollect whether the accused persons were interrogated before him or not. Though he admitted that clothes were seized before him but he does not know what was seized from Dhaniram. After declaring him hostile he was cross-examined, in which he stated that axe, weapon of offence, was seized on the basis of disclosure statement of Dhaniram, lathies were seized on the basis of statements given by Anandram, Ramdulari, Ramgilas and Ramkumar. He has further stated that clothing of Anandram, Ramdulari, Ramgilas and Ramkumar were seized from them in his presence. However, he further stated that since long time has elapsed (as he was examined on 22.12.1998 i.e. more than 9 years after the incident), he does not recollect whether the accused persons gave the above information or not. In the cross-examination by the defence he has stuck to his claim that the seized axe and lathies were stained with blood and that clothing worn by the appellants were seized in his presence in the Dudhadhari Math.

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13. PW-10 Anjorwa is an injured eyewitness and he has lodged the FIR of Ex.P/16-A in which he has stated that the incident is of some seven years back when he was present in his house. His father Dukhiram was raising a wall when accused persons came there and abused Dukhiram using filthy language for raising wall. His father asked them not to abuse and convene the Panchayat of heads of the village. He has further stated that thereafter Dhaniram exhorted the other accused persons to assault Dukhiram, at that time Dhaniram was holding lathi, Anandram axe, Ramdulari axe and Rambilas was holding *Kudali* (spade). All the accused persons together started assaulting his father, at that time his mother Bodhinbai came and asked them not to assault, whereupon the accused persons challenged her to come there and thereafter, started assaulting her also. Manharan, his brother, reached the place of incident thereafter and the accused persons started assaulting him by axe, lathi and *Kudali*. He also went there to intervene, upon which the accused persons told him, "you're also coming, we shall not leave you alive", and started assaulting him on his head, hand, buttocks, as a result of which he fell unconscious. His elder brother Rajaram took him to police station where he lodged the repot of Ex.P/16-A. He also gave merg intimation Ex/P/17 and Ex.P/18 regarding death of his brother Manharan and mother Bodhin Bai.

14. Initially this witness was not cross-examined by the defence. This Court vide order dated 14.11.2006 directed the Registry of this Court to send the record immediately to the trial Court and further directed the learned 1st Additional Sessions Judge, Baloda Bazar to summon PW-10 Anjorwa and allow the counsel for the accused persons to cross-examine him and after such cross-examination send back the record to this Court for disposal of this appeal on merits, as per provisions of Section 391 of the Cr.P.C. Accordingly, this witness was subjected to further cross-examination on 19.1.2007.

15. In the cross-examination he has stuck to his examination-in-chief regarding weapon of offence the accused persons were holding at the time of incident. Apart from above contradiction, omission regarding raising of wall, use of filthy language have also been pointed out in his report and diary statement. He has admitted that he kept Mankibai, as his wife after the death of her husband

Manharan. He has also stated that Manharan resided in another house whereas he resided with his father Dukhiram and mother Bodhin Bai and the distance of the house where Mankibai resided and the house of Dukhiram, is about 200-250 meter. On the date of incident he did not see mother of Mankibai on the place of incident. He has further stated that after the death of husband of Mankibai, he went to the maternal house of Mankibai and made her his Chudi wife and he had Chudi marriage some 13-14 years before. He has denied the suggestion that at the time of incident Manharan himself was present in the house of Dukhiram along with Dukhiram and his mother and stated that Manharan was present in his own house. When Dhaniram and Dukhiram were talking, at that time Manharan came to thrashing field of Dukhiram. He has further denied the suggestion that Manharan came and alleged that "you have illicit relationship with Mankibai", and asked him to discontinue illicit relationship. He has further denied the suggestion that at that time, he was armed with axe and assaulted Manharan with axe. The suggestion that her mother also objected to his illicit relationship with Mankibai, is also denied. He also denied that because of the above allegation, he assaulted his father and mother with axe and stated that it is incorrect to say that he had stated, "he shall not leave Mankibai even if he is required to kill Manharan etc.". He has further denied the suggestion that Manharan, Dukhiram assaulted him with lathi in their self defence and quarrel started inside the house and it continued till they reached their kitchen garden and further to the place of the incident *Med* (boundary).

16. PW-13 Sahatrinbai, mother-in-law of deceased Manharan, has stated that she knew Manharan, Bodhim and Dukhiram who died some eight years back. At about 5.00 p.m. she was proceedings towards the house of Dukhiram from the house of her son-in-law Manharan. When she reached near the place of incident, she saw Ramdulari was holding axe and rest of the accused persons were holding lathi and they were assaulting Manharan, Dukhiram and Bodhin Bai. First they assaulted Dukhiram with lathi and thereafter they assaulted Bodhin Bai and her son-in-law Manharan. When Anjorwa came there they also assaulted him with lathi and axe on his head, hand, waist, as a result of which he fell down. After assaulting

them all of the accused persons fled toward the thrashing field of Mati. In the cross-examination she has denied the suggestion that she heard Maharan blaming Anjorwa that he had developed illicit relationship with his wife Mankibai, as a result of which Marpeet took place between them, Anjorwa brought axe and assaulted Manharan. She has also denied the suggestion that Dukhiram and Bodhin Bai assaulted Anjorwa because he had illicit relationship with Mankibai and thereafter, Anjorwa assaulted Dukhiram and Bodhin with axe. She has denied the suggestion that at the time of Marpeet, the accused persons were not present. She has stated that when she heard the noise she rushed from the place of Rathyatra and saw the accused persons assaulting. At that time she did not see any outsider in the house of Dukhiram. The only omission in her diary statement of Ex.D/1 regarding the fact that she saw accused persons and others going towards the thrashing field of Mati has been pointed out to this witness.

17. PW-15 Bhukhinbai, wife of Rajaram s/o Dukhiram, has stated that at the time of incident at about 4.00-5.00 p.m. she was present in her house. At that time her father-in-law Dukhiram was also present he asked Anandram as to why he had dug pit near his wall whereupon Anandram dragged him by catching hold of his hand and took him to his field. His father-in-law fell there, thereafter, all the five accused persons who were present there, on being exhorted by Anandram started assaulting Dukhiram. At that time Anandram was holding *Kudali* , Ramdulari axe and Ramgilas and other two accused persons were holding lathi. Thereafter, Bodhin Bai also came there and asked them not to beat Dukhiram, whereupon she was also assaulted on her head by Ramdulari with axe and other accused persons assaulted her by lathi. When Manharan reached there, he was also assaulted by the accused persons. At that time her younger brother-in-law Anjorwa came there and stopped them, however, he was also assaulted by them, as a result of which the brain material of Manharan had come out, there were injuries on the head of her father-in-law and face of her mother-in-law and there was incised cut wound on her head. She had seen the incident with a distance of five feet. After seeing the Marpeet, she fled from there. She had witnessed the incident from the other side of wall. The accused

persons scaled the wall and came in her courtyard and threatened her husband Rajaram to run away otherwise they will kill him also. Thereafter, the accused persons fled from there. In the cross-examination, she has denied the suggestion that there are three other houses in between her house and the house of Dukhiram. She has denied the suggestion that Anjorwa lives in Basti. She has admitted the suggestion that Mankibai and Sahatrinbai lives in the house of Dukhiram and Mankibai was the wife of Manharan and after the death of Manharan, she was married to Anjorwa. She has further denied that since there was dispute regarding illicit relationship of Anjorwa and Mankihbai, Anjorwa assaulted Manharan, Dukhiram and Bodhin Bai. She has denied the suggestion that in the above fight, Manharan assaulted Anjorwa with axe and in retaliation Anjorwa assaulted Manharan with axe and thereafter he assaulted Dukhiram and Bodhin Bai with axe. She has further stated that at that time she did not see Manki Bai and her mother at the place of incident. She has further denied the suggestion that Firat Patel was present at the time of incident and stopped them from quarrelling. She has admitted that Firat had fled from the place of occurrence out of fear.

18. Learned counsel for the accused/appellant submits that the evidence of injured eyewitness PW-10 Anjorwa is unreliable and untrustworthy because (i) in the FIR he has alleged that Dhaniram was holding axe and other accused persons were holding lathi whereas in the Court he has stated that Dhaniram was holding lathi and rest of the accused were holding axe and *Kudali*, (ii) the sequence of events given by him is not corroborated by the other witnesses namely Sahatrin bai and Bhukhin Bai, (iii) he has alleged that deceased persons were assaulted by axe and lathis, however, as per evidence of Dr. Patel (PW-6) all the injuries present over the persons of deceased were caused by hard and sharp edged weapon and the same could not be inflicted by lathi, (iv) the accused persons have been convicted with the aid of Section 149 of the IPC whereas there is no evidence on record regarding formation of unlawful assembly by the accused persons in prosecution of their common object being members of unlawful assembly, (v) there is no specific overt act attributed to each of the accused such as, as to which of the accused

persons gave blow to the deceased and that too on which portion of the body, which was fatal to life and in the absence of any specific evidence regarding formation of unlawful assembly in furtherance of their common object of committing the crime in question, the accused persons cannot be convicted with the aid of Section 149 of the IPC.

19. The defence put forth by counsel for the accused/appellants was probable and the same has been brushed aside simply on assumption and surmises. It was contended that evidence of PW-13 Sahatrin Bai and PW-15 Bhukhin Bai is in complete variance with the account given by PW-10 Anjorwa. Thus, considering the totality of circumstances and further considering the fact that independent witnesses have not been examined and so-called eyewitnesses are close relatives of deceased persons, appellants ought to have been extended the benefit of doubt.

20. We have referred to the statements of the eyewitnesses Anjorwa Prasad, Sahatrin Bai and Bhukhim Bai in detail. It is worthwhile to mention here at this juncture that all these three witnesses were examined after almost eight years of the incident. It is not in dispute that PW-10 Anjorwa sustained injuries in the said incident as described in the injury report of Ex.P/8 according to which, he sustained four incised wounds, two bruises and two swellings in the incident. It is also not in dispute that some six hours after the incident Anjorwan lodged the FIR (Ex.P/ 16-A) in the police station in which he has mentioned the roles played by all the five accused persons in the incident in detail on the basis of which investigation commenced. He has also lodged merg intimation with respect to death of Manharan and Bodhin Bai. Deceased Dukhiram died on way while being taken to the hospital. No doubt, there is a discrepancy in the Court statement of this witness regarding the weapons of offence the appellants were holding at the time of incident, as pointed out by learned counsel for the appellant. There is also discrepancy with respect to sequence of events as narrated by other eyewitnesses and this witness before the Court. So far as the medical corroboration of the statement of this witness is concerned, Dr. Patel (PW-6) has initially opined that all the injuries were of different sizes and if it were caused by one weapon, the sizes of the

injuries will be almost equal. He has further opined that the injuries sustained by Manharan, Bodhin Bai and Dukhiram are incised injuries, which could be caused by sharp edged weapon and not by lathi. However, he has further stated that sometimes incised wound can be caused by broken lathi also. He has opined that injuries present over the person of deceased and injured could be caused by the weapons of offence seized from the accused persons.

21. If we carefully consider the discrepancy in the account of the incident given by PW-10 Anjorwa in his Court statement and FIR (Ex.P/ 16-A) and if we consider that the incident occurred in the evening when all of a sudden five accused persons armed with weapon, started assaulting Dukhiram and continued to assault Bodhin Bai and Manharan and thereafter, the complainant himself, as a result of which three persons died and complainant himself sustained grievous injuries, it would not be appropriate to expect that the complainant should memorize the entire incident and narrate as to which of the accused persons was holding which weapon, who assaulted by which weapon to whom and who assaulted him first. So far as argument of learned counsel for the appellants that deceased persons sustained incised wounds which could not be caused by hard and blunt object like lathi, is concerned, though Dr. Patel (PW-6) has given contradictory opinion in his deposition before the Court, nevertheless Dr. Modi's Medical Jurisprudence & Toxicology (22nd Edition) in Chapter XII "Injuries by Mechanical Violence" while dealing with "Incised Looking Wound" has observed at page No. 342 as under:

> "Occasionally, on wounds produced by a blunt weapon or by a fall, the skin splits and may look like incised wounds when inflicted on tense structures covering the bones, such as the scalp, eyebrow, iliac crest, skin, perineum etc., or by a fall on the knee or elbow when the limb is flexed. But the edges of such wounds will be found irregular with a certain amount of bruising, and small strands of tissues may be seen at the bottom bridging across the margins, if examined with a hand lens. In the case of wounds of the scalp, the hair bulbs will be found crushed, if they are inflicted with a blunt weapon, but will be found cut and forced into the wound, if produced by a

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cutting weapon like a heavy edged axe or a chopper.

22. In the instant case also, majority of the wounds sustained by the deceased persons are over the scalp region and therefore, in our considered view to brush aside the version of injured eyewitness PW-10 Anjorwa solely on the ground that there is some discrepancy in the description given by him about the assault made by the accused persons, would not be appropriate. As for the discrepancy in the statement of PW-10 Anjorwa as also PW-13 Sahatrin Bai and PW-15 Bhukhin Bai, all these three witnesses were examined in the year 1998 i.e. after almost 8 to 9 years of the incident and therefore, discrepancies regarding details of sequence of events, weapons of offence and the manner of assault etc. are natural and only on the basis of these discrepancies, the injured eyewitness account of PW-10 Anjorwa, cannot be disbelieved.

23. The judgments citied by learned counsel for the appellants in support of her contentions, are distinguishable on facts.

24. In the matter of Bhola Singh Vs. State of Punjab (supra) the so-called eyewitnesses PW-1 and PW-2 were disbelieved and their presence on the spot was doubted because they tried to give evidence with respect to the assault caused by sharp edged weapon so that it could match with the injuries found over the person of the deceased.

25. In the matter of State of Rajasthan Vs. Bhanwar Singh (supra), the State went in appeal against the order of acquittal delivered by the High Court who acquitted the accused persons on the ground of unexplained delay in lodging the FIR of more than one day and also by recording a finding that presence of PWs. 3, 4 and 8 on the spot of occurrence is improbable. In these circumstances, the Apex Court considering the presence of the above witnesses highly improbable, unexplained delay in lodging the FIR and also considering the medical evidence at total variance with the ocular evidence, rejected the appeal against acquittal.

26. Similarly in the matter of Suresh Choudhary Vs. State of Bihar (Supra) the Apex Court doubted the presence of sole eyewitness PW-8 on the place of incident as he was not injured in the incident even

though he should have been the main target of attack. On facts of that case, the entire prosecution case as to its genesis as also the time of the incident, time of death of deceased and time of registration of complainant and subsequent investigation, was held to be doubtful and considering the discrepancy between the oral and medical evidence regarding the use of bomb in the case, evidence of PW-8 was held to be unreliable and the conviction was set aside.

27. In the matter of Patel Chela Viram Vs. State of Gujarat (Supra) also the sole eyewitness of the case was not believed as he was not only highly interested witness but also the version given by him was highly doubtful and in fact he was a chance witness and his version was not corroborated by the medical evidence, under these circumstances, disbelieving the version of sole eyewitness conviction was set aside.

28. In the matter of Vijay Kumar Vs. State of Bihar (Supra) also the appellants were acquitted considering the contradiction and exaggeration present in the evidence of prosecution witnesses and also considering the evidence of the doctor and investigating officer, the credibility of the prosecution case was doubted and presence of the eyewitnesses on the place of occurrence was held to be doubtful and therefore, their version was disbelieved and benefit of doubt was given to the accused.

29. However, in the present case the ratio of law laid down in the above cited judgments is distinguishable on facts as the instant case is based on the testimony of injured eyewitness who sustained severe grievous injuries in the same incident and promptly lodged the report in the police station naming all the accused persons and as per opinion of the doctor injuries sustained by Anjorwa were sufficient to cause his death in the absence of proper treatment. The evidence of this witness is corroborated in material particulars from the statements of PW-13 Sahatrin Bai and PW-15 Bhukhin Bai who have confirmed that the appellants participated in commission of the offence.

30. So far as the submission of counsel for the appellants that the prosecution has failed to establish formation of unlawful assembly by

the accused persons in prosecution of their common object to commit the murder of deceased Dukhiram, Bodhin Bai and Manharan and attempt to commit murder of Anjorwa, is concerned, in a case under Section 149 of the IPC if the accused is a member of unlawful assembly, the common object of which is to commit certain crime and if that crime is committed by one or more members of that assembly, every person who happens to be member of that assembly shall be liable for that criminal act by virtue of his being member of that assembly irrespective of the fact whether he really committed the act or not. To attract Section 149 of the IPC, the prosecution must prove that commission of the offence was by any member of the unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such that members of the assembly knew that it was likely to be committed. In the instant case verbal exchanges took place between Dukhiram deceased and Dhaniram accused and thereafter when on being challenged by Dhaniram, Dukhiram reached the boundary, all the accused persons together started assaulting the deceased as a result of which he fell on the ground and even thereafter, they continued beating him and when Manharan and Bodhin Bai came there to intervene, they were also assaulted by the accused persons brutally till death. Even complainant Anjorwa was also beaten by all the accused persons and thereafter, considering all of them to be dead, they fled from the scene of occurrence. Under these circumstances, the inference of the Court below that all the five accused persons came there armed with deadly weapons with a common object to beat the complainant party, cannot be faulted.

31. The appellants have come with a specific defence of innocence and false implication. Their specific defence is that complainant Anjorwa had illicit relationship with wife of Manharan (since deceased) Mankibai, quarrel took place between Manharan and Anjorwa, as a result of which Manharan assaulted complainant Anjorwa with axe who retaliated by assaulting him with axe and when Dukhiram and Bodhin Bai intervened on behalf of Manharan, they were also assaulted by Anjorwa, who in their defence assaulted Anjorwa also and in that process deceased persons sustained grievous injuries and succumbed to the same and Anjorwa also sustained

grievous injuries. The appellants have not been able to establish this defence either by way of cross-examining the prosecution witnesses or by examining any independent witness in their defence. They have not examined any witness of the above fact and have stated the same in their defence under Section 313 of the Cr.P.C. From the material available on record we find that though the accused persons were released on bail between 1989 to 1990, no document or oral evidence has been given by the appellants before the trial Court to demonstrate that they at any point of time complained against the partisan investigation of the police before the higher authorities that they have been falsely implicated in order to screen the real offender. However, they have not led any evidence in their defence and have stated the same in their statements under Section 313 of the Cr.P.C. Apart from this, PW-2 Haricharan, PW-3 Panchram, PW-11 Baijnath, have stated in their Court statements that they heard from others that there was a quarrel between the appellants and the deceased persons on the date of incident, as a result of which three persons died and Anjorwa got injured. They are the independent witnesses and no suggestion has been given to these witnesses by the defence that the quarrel in fact took place between the deceased persons and complainant Anjorwa. So far as the complainant Anjorwa marrying Manki Bai, the widow of deceased Manharan, is concerned, all the three prosecution witnesses i.e. Sahatrin Bai, Bhukhin Bai and Anjorwa himself, have admitted this fact that after the death of Manharan, injured Anjorwa married his wife Manki Bai. Even otherwise the above defence version of the appellants further stands falsified from the fact that appellant Anandram and Ramdulari were sent for examination to Primary Health Center, Bilaigarh (Ex.P/10-A and P/11-A) as they also sustained simple injuries as described in Ex.P/10 and Ex.P/11 by Dr.C.S.Patel (PW-6), for which no explanation has been offered by them, thus, their presence on the place of occurrence is established. The finding of the trial Court that the defence taken by the accused persons has not been established and the same is highly improbable, is based on correct reasoning. We do not find any illegality or infirmity in the impugned judgment of the trial Court, which calls for interference.

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32. In the result, the instant appeal preferred by the appellants being devoid of substance is liable to be dismissed and is hereby dismissed. Sentence imposed upon the appellant Dhaniram has been suspended and he has been released on bail in pursuance of the order of this Court dated 14.5.2005, therefore, his bail bonds are hereby cancelled and he is directed to be taken into custody forthwith.

Sd/-
L.C. BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge